BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRENDA A. GOLDEN Claimant	)	
VS.	)	
HYGIENIC DRY CLEANERS Respondent	)	Docket No. 1,003,588
AND	)	
CINCINNATI CASUALTY CO. Insurance Carrier	)	

ORDER

Respondent requested review of the April 30, 2003 Award of Administrative Law Judge Bryce D. Benedict. The Appeals Board (Board) heard oral argument on October 8, 2003.

APPEARANCES

Paul D. Post of Topeka, Kansas, appeared for the claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the April 30, 2003 Award.

ISSUES

Respondent and its insurance carrier appeal the Award entered on April 30, 2003 by Administrative Law Judge (ALJ) Bryce D. Benedict. The sole issue for appeal is the nature and extent of claimant's impairment. More to the point, respondent argues that claimant continues to perform all of the work tasks identified by the vocational specialists. As a result, respondent and its insurance carrier adamantly maintain claimant has

sustained no task loss. Consequently, they argue the resulting work disability should be less than the 47.2 percent work disability awarded by the ALJ.

Claimant contends the ALJ correctly evaluated the evidence offered by the parties and appropriately found claimant is no longer able to perform some of the more physical aspects of her job for respondent. This inability to perform certain aspects of the tasks on a sustained basis translates to a 44.4 percent task loss, which when averaged with a 50 percent task loss, yields the 47.2 awarded by the ALJ. Accordingly, claimant requests the Board affirm the ALJ's award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed.

Claimant was an employee of respondent, working as vice president of operations. Although claimant is married to the owner of the company, she holds no ownership interest. Her job duties encompassed nearly every aspect of the dry cleaning business and by all accounts, she was a very valued employee. She would not only perform accounting duties for the business but she would oversee the dry cleaning process, filling in wherever needed so as to ensure the orderly flow of the work.

In August and September of 2000, claimant worked primarily in the assembly department. In this area, workers would repetitively examine the clothing as it was cleaned and pressed and match up and bag the garments to the customer's order number. Claimant was in charge of this department and, up to this time, worked with one other individual. Claimant is just over 5 feet tall and, in order to perform each aspect of the assembly job, she was required to routinely look upwards and use both upper extremities to hang the clothes on the racks.

On October 25, 2000, claimant was reaching up to put clothes on the rack when she felt a sharp pain in her right shoulder and up into her neck. She had experienced similar problems during this same time but on October 25, 2000, she noticed an acute increase in her pain. She sought medical treatment and was then referred to Dr. Shari Quick.

Dr. Quick diagnosed cervical radiculitis with myofascial pain and a decreased range of motion in the neck. Claimant was treated conservatively with anti-inflammatories and pain medications. Dr. Quick attempted steroid injections into the shoulder, but claimant did not receive any benefit from this procedure.

Following a period of work hardening and a functional capacities test, Dr. Quick released claimant to light physical work with occasional lifting of no more than 30 pounds,

frequent lifting of no more than ten pounds and constant lifting of negligible weight. In addition, Dr. Quick limited claimant's overhead lifting to 30 minutes out of every 60, with the need for resting and stretching every two hours.

Dr. Quick determined claimant had a permanent cervical injury for which she assigned a seven percent whole person impairment consistent with the principles set forth in the *Guides*.[1] When asked about her methodology, Dr. Quick testified that she utilized the range of motion model rather than the DRE categories as she felt the claimant's range of motion limitations dictated a higher rating. Dr. Quick also testified that she assigned no impairment for the shoulder complaints as she concluded claimant's complaints with respect to her shoulder had resolved.

At the request of her counsel, claimant was also evaluated by Dr. Peter Bieri. Dr. Bieri concluded claimant sustained an 11 percent whole body impairment pursuant to the *Guides*. Dr. Bieri also recommended only occasional lifting up to 20 pounds. Like Dr. Quick, he also utilized the range of motion model although for a somewhat different reason. According to Dr. Bieri, it is accurate to say that the range of motion model can be used as a differentiator if it will more accurately assess an injured person's impairment. Independent of that reasoning, the range of motion model is a more appropriate method to use because claimant had impairment not just to her cervical area but to her shoulder as well. The DRE methodology does not easily combine with impairments to extremities. For that reason, Dr. Bieri utilized the range of motion model to accurately combine both aspects of her impairment.

The ALJ found claimant sustained a ten percent whole body functional impairment. This finding reflected an average of the two ratings for the cervical injury addressed by both Drs. Quick and Bieri and added an additional two percent to the upper extremity which Dr. Quick failed to consider. Neither party takes issue with this finding and, as a result, the Board will not disturb that aspect of the ALJ's Award.

The real dispute in this appeal stems from the work disability analysis employed by the ALJ and the facts surrounding claimant's present job performance.

Because claimant's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the work was

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

> earning at the time of the injury and the average weekly wage the worker is earning after the injury. [2]

This statute must be read in light of *Foulk* [3]. In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage.

Here, claimant's employer accommodated her although not at a comparable wage. Nevertheless, she continues to work as best she can, thus minimizing her potential wage loss and the respondent's corresponding potential for work disability. Indeed, respondent does not argue that she could find alternative or more appropriate work elsewhere for a higher wage. Respondent merely argues that because she continues to do certain of her tasks that violate her restrictions, she has no task loss whatsoever.

Since she returned to work, claimant has been unable to perform all of her normal work duties with the speed and to the extent she once did. She is no longer able to routinely lift customer's large orders and carry them to the car. She is not able to repetitively bag clothes to be cleaned and continuously throw them in the bin as she had before her accident. Claimant is also forced to limit the time she spends inspecting clothes, as it requires her to use her upper extremities and neck in such a manner that aggravates her symptoms. Although she admits doing all of her pre-injury job duties on a limited basis, it is uncontroverted that she no longer does them in a sustained manner and to the same extent she had before October 25, 2000.

In an effort to deal with this problem, respondent cut claimant's pay by 50 percent and in turn, hired a husband and wife team to replace claimant. Unfortunately, this arrangement has yet to meet respondent's needs. Working together, those two have not been able to do all the job tasks that claimant, working alone, could before her injury. Although she continues working and performing her duties with the assistance of others, with her physical limitations and her small stature, she is unable to be as productive for respondent as she once was.

Respondent argues claimant has sustained no task loss as a result of her work-related accident. Indeed, claimant concedes that at times, *when no one else is there to back her up* she will carry a customer's order to his or her car as part of her employer's

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[2] 1999 Supp. K.S.A. 44-510e.

[3] *Foulk v. Colonial Terrace*, 20 Kan. App.2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

customer service.[4] This will sometimes exceed the restrictions imposed by the doctors. However, the testimony of both claimant and her husband make it clear that she no longer works at the same pace she did before her injury and then, if and when she violates the physician-imposed restrictions, she does so only when compelled to do so by the absence of other alternatives. There is no evidence that claimant routinely, day in and day out, does all the job tasks that she once did before her injury. Only when circumstances require will she perform a task that exceeds her restrictions.

Drs. Quick and Bieri were asked to speak to the issue of task loss. Claimant's job history was analyzed by Monty Longacre and Richard Santner, both vocational specialists. Mr. Longacre identified a total of seven tasks, while Richard Santner identified a total of 17 unduplicated tasks.[5] To further complicate the task loss issue, respondent hired Kathy Blankenship, a physical therapist by training, to perform an on-site evaluation. Ms. Blankenship spent less than an hour at the respondent's business watching the claimant's husband, Grady Golden, rather than claimant or any of the other workers, perform the various job duties at issue. At no time did Ms. Blankenship observe claimant's work activities. Thus, her evaluation is not particularly instructive. In both her testimony and in her written report, she focused on generic alternative methods of performing the various job duties. Had the disputed issue centered around the feasability of accommodation, her ideas and suggestions might have been relevant. Under these circumstances, they are not. It is uncontroverted that respondent has accommodated claimant, allowing her to alter her work methods and the tasks she must do during the workday. In addition, respondent has hired two additional employees to help complete the work required.

According to Dr. Bieri, claimant has sustained something between a 33 to a 57 percent task loss, depending on the task loss analysis used. Dr. Quick's opinion with regard to task loss analysis was significantly different. When utilizing the seven tasks identified by Mr. Longacre, she opined claimant lost the ability to perform as little as one and perhaps as many as four tasks, assuming each of those offending tasks involved overhead work. The ALJ found that three of the seven tasks involved overhead work and this translated to a 42.7 percent task loss. The ALJ wholly disregarded Dr. Quick's further opinion that, utilizing the task loss analysis of Mr. Santner, claimant bore no task loss. Apparently, Dr. Quick's opinion was conditioned upon the assumption that each of the tasks was done on an intermittent basis or only in short blocks of time rather than on a repetitive and extended basis. The evidence indicates that those tasks were done extensively during a work day and as such, Dr. Quick's opinion fails to recognize the true nature of claimant's work for respondent and the difficulties she had in performing her particular work tasks given her small stature and her physical impairment and resulting

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[4] R.H. Trans. at 44-46.

[5] Mr. Santner originally indicated that tasks #8 and #13 should have been combined but then appeared to change his mind.

restrictions. Thus, the Board finds the ALJ's decision to disregard the zero percent task loss opinion was justified.

After considering the ALJ's reasoning and the arguments of counsel, the Board is persuaded that the ALJ's finding that claimant sustained a 44.4 percent task loss is reasonable and is hereby affirmed. This figure adequately reflects the task loss sustained by claimant as a result of her work-related injury of October 25, 2000.

The balance of the Award is not at issue and need not be addressed nor discussed.

AWARD

WHEREFORE, it is the finding of the Board that the Award entered by Administrative Law Judge Bryce D. Benedict dated April 30, 2003 is hereby affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul D. Post, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director